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IN THE 84-6447

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

RAYMOND EUGENE TEAGUE, Petitioner,

v.

STATE OF TENNESSEE, Respondent.

ON APPLICATION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

PETITIONER'S BRIEF

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OPINIONS FILED

This application for a writ of certiorari is brought to the United States Supreme Court from an adverse decision upon direct appeal after a second sentencing hearing in a death penalty case, the sentence of death having previously been set aside on the original direct appeal as a result of errors committed in the original sentencing hearing. The original direct appeal was reported at State v. Teague, 645 S.W.2d 392 (Tenn. 1983). In that opinion, the Tennessee Supreme Court reversed the sentence of death and remanded the cause to the trial court for a sentencing hearing. The direct appeal from that sentencing hearing was reported as State v. Teague, 680 S.W.2d 785 (Tenn. 1984). In that opinion, the sentence of death by electrocution was affirmed. A petition to rehear was filed but denied without opinion on December 10, 1984. An execution date of January 15, 1985 was set by the Tennessee Supreme Court but has since been set aside by that same Court in order to give the petitioner an opportunity to file this petition. This is Mr. Teague's first application for a writ of certiorari.

JURISDICTION

The petitioner submits that the questions presented involve the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and this Court, therefore, has jurisdiction pursuant to Title 28 U.S.C. 1257(3). Since the time for filing this petition for a writ of certiorari was extended to and including March 8, 1985, this petition has been timely filed with this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor . . ..

2. The Eighth Amendment of the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment of the United States Constitution:

> Section 1. All persons born unnaturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

REFERENCES TO THE RECORD

Reference in this document to the second sentencing trial transcript of evidence shall be designated as follows: (Tr. __). Reference to the official court record of the pleadings and court entries of the original trial record shall be designated as follows: (T.R. __). References to exhibits not found in the technical record or the transcript of evidence shall be designated as follows: (Exh. __).

STATEMENT OF THE FACTS

On April 25, 1988, the defendant was indicted for first degree murder for the killing of Teresa Lynn Teague (T.R. 5-6). Defendant was convicted of first-degree murder on November 22, 1988 in Division I of Hamilton County Criminal Court and the jury fixed his punishment as death by electrocution (T.R. 12-13).

Upon direct appeal to the Tennessee Supreme Court, defendant's conviction was affirmed, but his sentence of death was reversed and the case was remanded to the trial court for resentencing (T.R. 14-31).

A new sentencing hearing was conducted before a jury on August 22-25, 1983 and after the jury was selected, the State began its proof.

During the course of the State's evidence, over defense counsel's objection, the trial court permitted the State to rely on defendant's conviction of accessory before the fact to a second-degree murder in the killing of John Mark Edmonds, as an "aggravating circumstance" under T.C.A. 39-2-203(i)(2) and to present to the jury evidence of that conviction (Tr. 4-5, 632-633, 653). T.C.A. 39-2-203(i)(2) provides the statutory aggravating circumstances as follow:

> (2) The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.

This conviction was based on the defendant's plea of nolo contendere agreed to by the State and defense counsel and accepted by the Court on June 15, 1982, in Division I of the Hamilton County Criminal Court (Exh. 1 to the motion for new trial). The agreement contemplated that he was to receive a ten-year sentence which was imposed by the Court. The jury ultimately returned a verdict finding the aggravating circumstance found at T.C.A. 39-2-203(i)(2). The jury was allowed to consider this conviction as an aggravating

circumstance even though it was not entered prior to the commission of the killing involved in this case, alleged to have occurred on April 4, 1988 (T.R. 6). This conviction was also not entered prior to the original conviction of this petition on November 22, 1988 (T.R. 12-13). No proof was offered by the State at the hearing below to establish that the defendant himself used or threatened violence against John Mark Edmonds.

During its case in chief, the State was allowed to present hearsay testimony that the deceased was afraid of the defendant, that she was afraid to take a bath, that she was going to testify in the John Mark Edmonds' murder case (Tr. 465, 481, 591, 593).

Also in its case in chief, the State was allowed, over defense objection, to present evidence that the defendant was found in possession of a loaded and cocked .45 caliber pistol near the deceased's apartment on the night before her body was found (Tr. 488-491). The victim had not been killed by gunshot, but was found drowned in her bathtub (Tr. 587). Over objection by defense counsel, and a motion for mistrial, the State was permitted to cross-examine five of the defense witnesses concerning the alleged fact that the defendant had been found in possession of a .45 caliber pistol (Tr. 685-693, 757, 758, 858-860, 885-886, 907).

The State was also permitted in its case in chief, over repeated objection by the defense, to present evidence concerning the condition of the deceased's apartment and her bathing habits (Tr. 463-465, 470-473), the circumstances surrounding the discovery of her body and the investigation of her killing (Tr. 465-467, 585-591), and the circumstances of an incident in which the defendant and two other persons were stopped in the vicinity of the deceased's apartment the night before her body was discovered (Tr. 484-496, 508-512, 540-548).

During direct examination of the defendant's mother, Mrs. Susan Quarles, the witness was asked by defense counsel whether the defendant had "ever given her any trouble of any

kind", to which the witness replied, "He's been a very good son." (Tr. 913). Upon cross-examination, Mrs. Quarles was asked whether defendant had "ever been in any other trouble", and she replied, "He hasn't given me any trouble." (Tr. 921-922). Then, referring to a prior incident in which the police and district attorney had been called to investigate certain allegations made by the defendant's brother, the prosecutor asked the following questions:

> Mrs. Quarles, didn't you express to me, with a room full of people in your home, that, based on what you knew with his brother Jimmy, and your concerns to me, that you felt that Randy was planning to kill somebody? Tr. 923.

Defense counsel immediately objected and moved for a mistrial. Further examination in the absence of the jury, during which Mrs. Quarles explained that the "trouble and concern" that she had felt was a result of Jimmy Quarles' accusations and not of anything said or done by the defendant, the trial court overruled the defense motion for mistrial and instructed the jury as follows:

> Jurors, I instruct you to disregard Mr. Sloan's last question and, as much as humanly possible, to forget you ever heard the question. Tr. 942.

At the first trial of this defendant, the appeal of which is reported at 645 S.W.2d 392 (Tenn. 1983), the State had introduced into evidence facts surrounding a 1978 arrest of the petitioner for an offense unrelated to the offense for which he was on trial. This warrant was later dismissed. The State was attempting to rely on this prior charge which had been dismissed as an aggravating circumstance. Upon a review of this record, the Tennessee Supreme Court stated:

> In our opinion, the admission of the warrant into evidence over the objection of the appellant was error. The fact that the appellant was arrested in 1978 on a charge of conspiracy to commit murder, in our opinion, is not relevant to either of the statutory

> aggravating circumstances sought to be proven by the State, or to a mitigating factor raised by the appellant . . .. The probability of prejudice resulting from the consideration of the improperly admitted evidence, in our opinion requires that the sentence of death be reversed and the case be remanded to the trial court for a sentencing hearing. 645 S.W.2d at 399.

It is the substance of this warrant that the Tennessee Supreme Court had ruled to be prejudicial requiring reversal of the sentence that the District Attorney General in the second sentencing hearing was referring to in his question to the petitioner's motion, Mrs. Susan Quarles, as previously referred to.

During cross-examination of the State's witness Melinda Bryan, the trial court prevented defense counsel from questioning her as to the deceased's promiscuity, use of drugs, and embezzlement from her employer (Tr. 607-612, 630-631). During its case in chief, the trial court prohibited the defense from presenting to the jury testimony by Mary Mazza tending to show that Terri Teague had coolly and voluntarily killed John Mark Edmonds and that immediately after that killing, she did not appear to be under the dominstion, control, or influence of the defendant (Tr. 880-884). (This is in reference to the same situation to which the petitioner had previously pled nolo contendere to the second degree murder in the killing of John Mark Edmonds as earlier referred to here.) The trial court also prevented several other defense witnesses from testifying as to Terri Teague's lack of concern for her children (Tr. 890-891, 897, 919) and as to the fact that the defendant never said anything bad about the deceased either after their divorce or after the Edmonds case came up (Tr. 688, 847, 920).

At the close of proof, defense counsel submitted to the trial court a written list of fifteen mitigating circumstances raised by the evidence (Exh. 12, Tr. 1066), and requested that the Court charge the jury on the circumstances so listed in addition to the statutory mitigating circumstances. However,

the trial court refused to charge the prepared list, ruling that those circumstances could only be specified to the jury by way of closing argument (Tr. 971-973). In course of its charge, the Court instructed the jury, in pertinent part, that "In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but are not limited to, the following . . .." The Court then read the eight statutory mitigating circumstances set forth in T.C.A. 39-2-203(j) (Tr. 1047-1048). Prior to giving the statutory charge, and after defense counsel had argued its mitigating circumstances to the jury, the Court instructed the jury that "Statements, arguments, and oral remarks of counsel are intended to guide you in understanding the law, but they are not evidence." (Tr. 1043).

The trial court charged the jury as to the definition of circumstantial evidence, but did not charge the jury that where the evidence is circumstantial, it must be so cogent and convincing as to exclude every other reasonable theory or hypothesis except that of the facts sought to be proved by the State (Tr. 1044).

The trial court also instructed the jury the language of T.C.A. 39-2-203(g) which provides as follows:

> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstances or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. (Emphasis added). Tr. 1048-1049.

The jury was sent out for deliberation at the conclusion of the instructions by the Court and in time returned a verdict of death.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE TENNESSEE SENTENCING STATUTE AT T.C.A. 39-2-203(g) AND THE INSTRUCTION TO THE JURY, VERBATIM, CONSISTENT WITH THAT SUBSECTION OF THE CODE IS UNCONSTITUTIONAL DUE TO THE FACT THAT IT PROVIDES FOR A MANDATORY SENTENCE OF DEATH IF THE JURY CONCLUDES THAT ONE OR MORE AGGRAVATING CIRCUMSTANCES OUTWEIGH ANY MITIGATING CIRCUMSTANCES.

Tennesee Code Annotated 39-2-203(g) provides, in pertinent part, as follows:

> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. (Emphasis added).

This Court, in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), disallowed the exercise of standardless discretion in capital case by juries. In Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), this Court held that the exercise of standardless discretion could not replaced with a mandatory penalty scheme. The Court found that mandatory death penalty statutes are incompatible with contemporary values and standards of decency regarding punishment. 96 S.Ct. at 2983-2989. Since Furman and Woodson have been decided, more recent cases emphasize the need for sentences of death to be based upon the characteristics of the individual offender and offense on trial. For example, see, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Supreme Court upheld as constitutional several statutory schemes mandating consideration by the sentencing authority of aggravating and mitigating circumstances surrounding the particular offense and offender,

against challenge that these schemes still allowed an unacceptable degree of discretion and arbitrariness in the sentencing process. None of these statutes reviewed in these decisions made the death penalty mandatory in any circumstances, with the possible exception of Texas, and in Jurek no issue was raised as to the "automatic" feature of the Texas statute.

As far as the petitioner knows, the United States Supreme Court has yet to address the question of whether a capital sentencing statute such as Tennessee's, which requires consideration of aggravating and mitigating factors but which makes the death sentence mandatory if the former are found to outweigh the latter, is constitutional.

This mandatory language in the Tennessee statute prohibits the jury from imposing a sentence of life under circumstances in which their reasons for doing so are impossible for them to crystallize or articulate. Due to the fact that this Court has made it clear so many times in cases such as Eddings and Lockett that any and all mitigating circumstances are admissible into evidence and should be considered by the jury, the petitioner respectfully submits that this language found at T.C.A. 39-2-203(g) is inconsistent with the language in those cases and should be found by this Court to be unconstitutional.

Further, since the statute speaks in terms of "aggravation" and "mitigation" and the specific statutory factors are limited to the circumstances of the offense and age, criminal record, and mental state of the offender, it tends to concentrate the jury's attention on matters concerning the particular offense and offender, and to exclude or discourage consideration of other and more general factors, such as the value to society of capital punishment, its moral or ethical justification, the nature and degree of pain that it inflicts on the defendant, its final, irrevocable character, and a host of other factors not directly involving the circumstances of the particular offense or offender. Thus, it is possible that a

jury might find nothing about the circumstances of the particular offense or the offender to be "mitigating" or that whatever mitigation might exist with respect to that offense or offender or "outweighed" by one or more statutory aggravating circumstances, and still believe, for one reason or another, that the penalty of death ought not to be imposed. Yet, the statute and the judge's instructions give them no choice but to impose that sentence.

This Court has expressed some reservation concerning such a mandatory sentencing formula. See the dissents to denial upon applications for writ of certiorari in King v. Mississippi, ___ U.S. ___, 77 L.Ed.2d 290, cert denied, May 2, 1983; Smith v. North Carolina, ___ U.S. ___, 74 L.Ed.2d 622 (1982); and Jones v. Illinois, ___ U.S. ___, 78 L.Ed.2d 264 (1983).

Although the State of Tennessee has acknowledged that the jury under this instruction has no choice but to impose the death penalty statute whenever they find that the aggravating circumstances outweigh the mitigating circumstances, State v. Melson, 638 S.W.2d 342, 366 (Tenn. 1982), the Tennessee Supreme Court has found the language to be constitutional and legal. Houston v. State, 593 S.W.2d 267 (Tenn. 1980), cert. denied, 449 U.S. 891, 101 S.Ct. 251, 66 L.Ed.2d 117 (1980); State v. Dicks, 615 S.W.2d 126 (1981), cert, denied.

Other states apparently agree with Tennessee. See, for example, People v. Brownwell, 404 N.E.2d 181 (Ill. 1980); Davis v. State, 665 P.2d 1186 (Okla. Crim. 1983).

There are several jurisdictions, however, which hold to the contrary: State v. David, 425 So.2d 1241 (La. 1983); State v. Watson, 423 So.2d 1130 (La. 1982); State v. Wood, 648 P.2d 71 (Utah 1982); State v. Woomer, 284 S.E.2d 357 (S.C. 1981). There are also numerous cases from the State of California which have found such a mandatory sentencing formula to be in violation of the Eighth Amendment and unconstitutional.

In this regard, see also, from the State of North Carolina, State v. Brown, 293 S.E.2d 569 (N.C. 1982); and State v. McDougall, 301 S.E.2d 308 (N.C. 1983).

For the foregoing reasons the Petitioner respectfully submits that the statutory scheme and the jury instructions in this case were in violation of the eighth Amendment of the United States Constitution and require the sentence of death to be set aside.

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY THAT IN ORDER TO FIND THE SECOND AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT, THE PROOF MUST EXCLUDE EVERY OTHER REASONABLE THEORY OR HYPOTHESIS EXCEPT THAT THE DECEASED WAS KILLED TO PREVENT HER FROM BEING A WITNESS AGAINST THE DEFENDANT IN ANOTHER CASE.

The evidenced adduced by the State in the sentencing hearing below tended to suggest that Terri Teague was killed in order to prevent her from being a witness against the Defendant in the John Mark Edmonds case. This proof is consistent with the statutory aggravating circumstance found at T.C.A. 39-2-203(6) which provides as follows:

> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

T.C.A. 39-2-203 requires that in order for the jury to find that an aggravating circumstance exists, it must be proved by the State beyond a reasonable doubt.

The Petitioner further contends that the basis for making out the aggravating circumstance under T.C.A. 39-2-203(6), according to the evidence presented by the State, is based solely on circumstantial, not direct evidence. For this reason, the Petitioner respectfully submits that the failure of the trial court to instruct the jury to the effect that every other reasonable theory or hypothesis, except that the deceased was killed to prevent her from being a witness against the Defendant in another case, must be excluded in order for the jury to find the second aggravating circumstance beyond a reasonable doubt.

The Petitioner respectfully submits that this Court should properly consider this issue as a violation of the

Fourteenth Amendment of the United States Constitution consistent with prior rulings in cases such as: (1) In re: Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) and Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which concerned the requirements of proof and instruction to the jury the guilt must be proven beyond a reasonable doubt. (2) Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) and Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) which make it clear that the burden of proof on all elements of the offense rest with the State. (3) Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978), which requires the jury to be instructed as to the presumption of innocence that is due to the defendant.

As in other jurisdictions, the law of circumstantial evidence in Tennessee requires that the evidence must not only be consistent with the guilt of the accused but it must be inconsistent with his innocence and must exclude every other reasonable theory or hypothesis except that of guilt and it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that he is the one who committed the crime. Marable v. State, 313 S.W.2d 451 (Tenn. 1958); Pruitt v. State, 460 S.W.2d 385 (Tenn. Crim. App. 1970); Sotka v. State, 503 S.W.2d 212 (Tenn. Crim. App. 1972); Overton v. State, 521 S.W.2d 229 (Tenn. Crim. App. 1974).

Furthermore, the courts of Tennessee have consistently held that when all the incriminating evidence against the accused in a criminal trial is circumstantial, the failure of the Judge to instruct the jury the law of circumstantial evidence, whether or not the respondent requests such instructions, is fundamental reversible error. Bunch v. State, 499 S.W.2d 1 (Tenn. 1973); Bishop v. State, 287 S.W.2d 489 (Tenn. 1956); Webb v. State, 203 S.W.2d 955 (Tenn. 1918); State v. Thompson, 519 S.W.2d 789 (Tenn. 1975). The evidence introduced by the State in this regard can be summarized as

follows: Don Parker testified that on the night before Terri Teague's body was discovered, he saw in her apartment a letter addressed to the deceased from the Hamilton County District Attorney's office, informing her that the trial of the Edmonds case had been postponed (Tr. 471-472). Parker testified that the deceased had talked to him about testifying in the Edmonds case, but she never said what she was going to do when she appeared in the court room (Tr. 480,481).

Jimmy Cook testified that the Defendant said to him, about a month before Terri Teague's death: "If Terri was out of the way that case would never go to court". (Tr. 508). Cook also testified that the Defendant never explained to him what he meant by "out of the way" and that he (Cook) did not know what the Defendant meant by that statement (Tr. 513-514).

Melinda Bryan testified that Terri Teague cooperated with the police in taping conversations between her and the Defendant in the Edmonds investigation and that she was listed on the indictment and scheduled to be a witness in that case (Tr. 583-585, 591, 593).

The above represents the sum total of the State's proof as to this aggravated circumstance and amounts solely, we submit, to circumstantial evidence only. As the record indicates, the circumstances surrounding the death of Edmonds remain clouded in overwhelming doubt. It was never contested that Terri Teague had shot Edmonds, the only question remaining was whether the Petitioner played any role as an accessory before the fact.

This Court has previously held that a capital sentencing hearing is itself a trial on the issue of punishment and, in relevant aspects, is like the preceding trial on the issue of guilt of innocence. Bullington v. Missouri, 451 U.S. 430 at 438, 101 S.Ct. 1852 at 1858, 68 L.Ed.2d 270 (1981).

For the foregoing reasons, the Petitioner respectfully submits that the failure of the court to instruct the jury on the law of circumstantial evidence concerning this aggravated

circumstance offered by the State is a violation of the Petitioner's Fourth Amendment rights to due process of law.

III. WHETHER SOME OF THE EVIDENCE INTRODUCED BY THE STATE IN THE SENTENCING HEARING WAS UNDULY PREJUDICIAL AND OTHERWISE INADMISSIBLE BECAUSE IT WAS NOT RELEVANT TO THE ISSUE OF PUNISHMENT OR TO ANY AGGRAVATING OR MITIGATING CIRCUMSTANCE OR OTHERWISE INADMISSIBLE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Petitioner respectfully submits that the State introduced evidence against the Petitioner in violation of the United States Constitution and otherwise not sufficiently probative or relevant in light of its prejudicial effect on the Petitioner.

A. In the present case, the testimony of Melinda Bryan and Don Parker that Terri Teague was afraid of the Defendant, that she was afraid to take a bath, and that she was going to be a witness against the Defendant in the Mark Edmonds case, was rank hearsay, based on conversations those witnesses had (or didn't have) with the deceased, whom the Petitioner had no opportunity to cross-examine. Such evidence did not come within any recognized exception to the hearsay rule, and bore no substantial indicia of reliability. There was no way the Defendant could rebut this evidence and its prejudicial effect is obvious. Therefore, the trial court erred and violated Defendant's constitutional rights to confront and cross examine the witnesses against him and his rights to due process due to the fact that it admitted the evidence and failed to strike the testimony.

T.C.A. 39-2-203(c) provides, in pertinent part, as follows:

> Any such evidence which the Court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the Defendant is accorded a fair opportunity to rebut any hearsay statements so admitted.

The petitioner respectfully submits that the above section, T.C.A. 39-2-203(c), in limited to the facts of the instant case, is unconstitutional.

In Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 33 L.Ed.2d 297 (1973), the United States Supreme Court held that State rules governing admission of hearsay testimony may not be applied in such a way as to abridge the right of a criminal defendant to confront and cross examine the witnesses against him as provided in the Sixth Amendment to the United States Constitution.

In recent decisions, this Court has shown a profound concern for the quality of information used in sentencing and for reliability in the fact-finding aspect of sentencing, given the peculiarly permanent and irrevocable nature of capital punishment. See, for example, Gardner v. Florida, 430 U.S. 349 at 357-360, 97 S.Ct. 1197 at 1204-1205, 51 L.Ed.2d, 393 (1977); Woodson v. North Carolina, 428 U.S. 280 at 303-305, 96 S.Ct. 2978 at 290-291, 49 L.Ed.2d 944 (1976).

Courts in other federal and state jurisdictions have directly held that hearsay evidence may not be received or considered by the sentencing authority without affording the Defendant to confront and cross-examine the source of the information, or otherwise, in the absence of significant indicia of reliability. Thus, in Proffitt v. Wainright, 685 F.2d 1227 (11th Cir. 1982), that Court held that the Defendant's constitutional rights were violated when the sentencing judge considered a presentence psychiatric report without affording the defendant an opportunity to cross-examine the psychiatrist who prepared it.

B. During the direct examination of Susan Quarles, Defendant's mother, the witness was asked by defense counsel whether Defendant had "ever given you any trouble of any kind", and the witness replied: "he's been a very good son" (Tr. 913).

Upon cross-examination, Mrs. Quarles was asked whether defendant had "ever been in any other trouble", and she responded: "he hasn't given me any trouble" (Tr. 921-922).

Then, the prosecutor asked the following question:

> Mrs. Quarles, didn't you express to me, with a room full of people in your home, that, based on what you knew with his brother Jimmy, and your concerns to me, that you felt that Randy was planning to kill somebody? (Tr. 923).

Defense counsel immediately objected and moved for a mistrial.

This question by the Assistant District Attorney General was with reference to the 1978 warrant which had been introduced into evidence in the previous trial and which caused the reversal because, according to the view of the Tennessee Supreme Court:

> The probability of prejudice resulting from the consideration of the improperly admitted evidence, in our opinion requires that the sentence of death be reversed and the cause be remanded to the trial court for a sentencing hearing. 645 S.W.2d at 399.

In this the second sentencing hearing, however, this evidence was allowed to come in with a curative instruction.

After the question was asked and objected to by defense counsel, Mrs. Quarles was questioned outside of the presence of the jury. She explained that the "trouble and concern" she had felt was the result of accusations made by the Petitioner's step brother, Jimmy Quarles, and not of anything said or done by the Petitioner. As has previously been stated, this arrest warrant was dismissed prior to indictment.

After the jury out hearing, the trial court overruled the defense motion for mistrial and instructed the jury as follows:

> Jurors, I instruct you to disregard Mr. Sloan's last question and, as much as humanly possible, to forget you ever heard the question. Tr. 942.

It should be obvious, the Petitioner submits, that the State's attempt to put before the jury the circumstances behind a prior charge against the Petitioner of solicitation to commit murder, which charge had been dismissed without a hearing and which was the basis of the reversal of the death sentence on the previous appeal, was prosecutorial misconduct fundamentally undermining the fairness of the entire sentencing hearing.

As the Tennessee State Supreme Court recognized in the prior appeal, such matter was irrelevant to the statutory aggravating circumstances relied upon by the State. And, as the trial court below recognized, the State's questions were not responsive to any factual issue raised in the witness's direct testimony. Both the Tennessee State Supreme Court and the trial court recognized the high probability of serious prejudice resulting from the jury's consideration of this unsubstantiated charge.

The petitioner respectfully submits that the trial court's instruction to disregard the State's question was not and could not have been sufficient to remove the prejudicial effect of that question.

As this court has pointed out:

> . . . There are some contexts in which the risk the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Bruton v. United States, 391 U.S. 123 at 135, 88 S.Ct. 1620 at 1627, 20 L.Ed.2d 426 (1968).

This case presents such a context. The petitioner had been convicted of first-degree murder, and the jury was asked to determine whether he ought to be put to death. His Mother was testifying in his behalf, and was confronted with a question, which amounted to testimony by the District Attorney General, as to whether she herself had in fact expressed the fear on an earlier occasion that the Petitioner was planning to kill someone. One can hardly imagine a context in which such a

testimonial "question" concerning other "planned" killings by a criminal defendant, already convicted of murder and confronting a possible death sentence, would leave a more indelible impression on the jury, or in which the consequences of failure to follow a curative instruction would be more vital. By qualifying his instructions with the words "as much as humanly possible", the trial judge, not only acknowledged that it might well be impossible for the jury to disregard the question, but in effect told the jury that if they could not disregard it, they need not do so.

The petitioner respectfully submits that this tactic, by the District Attorney General, was in violation of the Petitioner's right to due process consistent with the spirit of United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).

C. The second sentencing hearing, after the original sentence of death had been reversed by the Tennessee State Supreme Court, presented the relatively unique situation in which the jury impaneled to determine the question of life or death had not heard the proof on the question of guilt. The State, therefore, was in a position where it was necessary to introduce evidence as to how the crime was committed "carefully limiting [the] evidence to the essential background", State v. Teague, 688 S.W.2d at 788, of the crime.

The petitioner now contends that the trial court allowed the State to go so far afield beyond the "essential background" of the crime as to cause substantial prejudice to the Petitioner in violation of his rights to due process as provided by the Fourteenth Amendment of the United States Constitution.

1. Over objections of defense counsel, the trial court admitted testimony by Officer Don Chandler on direct examination during the State's case in chief, that at the time the officer stopped the truck in which the Petitioner was riding

on the night of the killing, the petitioner had in his possession a loaded and cocked .45 caliber colt commander pistol (Tr. 488-491). The victim was not killed by gunshot, but was found drowned in her bathtub (Tr. 587). There is no evidence that the .45 caliber pistol, or any weapon, was used to threaten or harm the victim, Terri Teague.

Thereafter, and over the continuing objection of defense counsel and a motion for mistrial, the State was permitted to cross-examine defense witnesses Blackwell, Richardson, Williams, Mazza, and Grider concerning the alleged fact that the Petitioner had been carrying a .45 caliber pistol (Tr. 685-693; 757, 758; 858-868, 885-886, 987).

The petitioner, therefore, contends that the trial court erred in permitting the prosecution to present evidence concerning the pistol in its case in chief because such evidence was irrelevant to the statutory aggravating circumstances relied upon by the State, was irrelevant to the issue of punishment or any other legitimate or admissible basis and was highly prejudicial to the Petitioner. The prejudicial effect was compounded by the court's allowance of the prosecutions cross-examination of several defense witnesses concerning the matter.

2. During the State's case in chief, the trial court admitted testimony, over repeated objection by defense counsel, concerning the condition of Terri Teague's apartment and her bathing habits (Tr. 463-465, 470-473), the circumstances surrounding the discovery of her body & the investigation of her killing (Tr. 465-467, 585-591) and the circumstances of the incident in which the defendant, Jimmy Cook and Marshall Skinner were stopped in the vicinity of Terri Teague's apartment the night before her body was discovered (Tr. 484-496, 508-512, 548-548).

Clearly, none of this testimony was relevant to the aggravating circumstances relied upon by the State. None of these matters are relevant to the issue of punishment. None of

these matters are "essential background" to the circumstances of the crime. At best, it served only to dramatize the the State's case; at worse, particularly with respect to the investigative stop on the night of the killing, it occasioned highly prejudicial testimony, such as that concerning the pistol and alleged statements by the Petitioner that he killed "that bitch". It was not probative of prior convictions for violent crimes, nor of a motive to kill to avoid prosecution, and certainly was not relevant to any aggravating factors presented by the State or mitigating factors raised by the defense.

IV. WHETHER THE TRIAL COURT ERRED AND DENIED DEFENDANT DUE PROCESS OF LAW IN PREVENTING HIM FROM ADDUCING EVIDENCE REGARDING THE CHARACTER AND BEHAVIOR OF THE DECEASED, WHICH EVIDENCE WAS IN REBUTTAL TO THE STATE'S THEORY THAT THE DECEASED WAS KILLED TO PREVENT HER FROM BEING A WITNESS AGAINST THE DEFENDANT.

During cross-examination of the State's witness Melinda Bryan, the trial court prevented the defense from questioning her as to Terri Teague's promiscuity, use of drugs, and embezzlement from her employer (Tr. 607-612, 630-631). During its case in chief, the defense was prevented from presenting to the jury testimony by Mary Mazza that Terri Teague said she coolly and voluntarily killed John Mark Edmonds, contrary to the State's theory in that case that she was acting under the control of the defendant (Tr. 880-884). The trial court also prevented several other defense witnesses from testifying as to Terri Teague's lack of concern for her children (Tr. 890-891, 897, 919), and as to the fact that the defendant never said anything bad about Terri either after their divorce or after the Edmonds case came up (Tr. 680, 847, 920).

Defendant contends that the trial court's exclusion of all testimony and cross-examination concerning the character and behavior of the deceased prevented him from rebutting the Sate's theory and evidence that she was killed to prevent her from being a witness against him in the Edmonds case, by evidence of a different motive for her slaying. In excluding this evidence,

the trial court denied the defendant the most basic elements of due process.

The United States Supreme Court has long recognized the right of a criminal defendant to present evidence in rebuttal to that offered by the prosecution on an essential element of its case. Thus, in Carver v. United States, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897), where the government offered evidence of a dying declaration tending to show that the defendant shot the declarant deliberately, the Court held that since the defendant had no opportunity to cross-examine the declarant, he was entitled to present testimony by his own witnesses tending to vary, deny or explain the declarations offered by the Government.

More recent decisions of the Supreme Court in the death penalty area have recognized the constitutional right of the defendant to effectively respond to evidence relied upon by the sentencing authority in fixing a sentence of death. Thus, in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Court held that a death sentence cannot stand where it may have been based, at least in part, on information contained in a pre-sentence report to which information defense counsel was not given access. The Court stated that due process of law is denied where the death sentence is imposed "on the basis of information which [the defendant] had no opportunity to deny or explain." 430 U.S. at 362, 97 S.Ct. at 1207. The Court recognized that where this opportunity is denied, it stifles that "debate between adversaries . . . essential to the truth-seeking function of trials." 430 U.S. at 360, 97 S.Ct. at 1206. The Court went on to hold that since it was possible that full disclosure followed by explanation or argument by defense counsel would have caused the trial judge to accept the jury's advisory verdict of life imprisonment, the death sentence must be vacated and the case remanded. 430 U.S. at 362, 97 S.Ct. at 1207.

These same principles were recognized in Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), wherein it was held that the defendant has a constitutional right to present evidence relevant to the mitigating circumstances and relevant to the issue of punishment on an individual basis.

Following these decisions, the federal circuit courts have reversed death sentences where the defendant was denied an opportunity to effectively respond to evidence offered by the State in support of the death penalty. Thus, in Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), a death sentence was reversed where the defendant was not afforded an opportunity to cross-examine a psychiatrist whose deposition testimony was submitted after the principal sentencing hearing. And in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), reh. denied, 606 F.2d 321 (5th Cir.), aff'd, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), a death sentence was reversed where the State failed to provide the defense prior to trial with the name of a psychiatric witness, as a result of which counsel was unable adequately to investigate, prepare and effectively cross-examine the witness. The Court stated that the State's failure resulted in "the defect which the Supreme Court identified in Gardner -- defense counsel's inability to challenge or answer the evidence on which the death sentence was based . . ." 602 F.2d at 699.

In the present case, the defense attempted to elicit from state witnesses on cross-examination, and from its own witnesses, testimony regarding the character, habits and behavior of the deceased, Terri Teague, not to suggest that her misconduct justified her killing, but as evidence suggesting a possible motive or explanation for her killing other than that advanced by the State. In particular, the testimony of Mary Mazza, which the jury was not allowed to hear, tended to show that Terri Teague coolly, voluntarily and deliberately shot and killed John Mark Edmonds and that she did not act under the

dominion, control or duress of the defendant, so that it would not have been necessary for him to kill her in order to prevent the State from establishing his culpability for murder in that case. By excluding evidence suggesting another motive for the killing, or tending to negate the motive advanced by the State, the trial court effectively prevented the defendant from rebutting the State's evidence. As held in State v. Fish, 621 P.2d 1072 (Mont. 1980):

> To improperly exclude evidence and testimony offered by the defendant as rebuttal to an essential element of the crime charged denies the defendant a full evidentiary hearing and deprives him of his right to a fair trial.

Id., at 1078. For these reasons, defendant's death sentence should be reversed.

V. WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO RELY ON THE PETITIONER'S CONVICTION AS AN ACCESSORY BEFORE THE FACT TO SECOND DEGREE MURDER AS AN AGGRAVATING CIRCUMSTANCE UNDER T.C.A. 39-2-203(i)(2), BECAUSE SAID CONVICTION WAS BASED ON A PLEA OF NOLO CONTENDERE AND WAS ENTERED AND USED AGAINST THE PETITIONER IN VIOLATION OF HIS RIGHT TO DUE PROCESS AS PROVIDED IN THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

T.C.A. 39-2-203(i)(2) provides the aggravating circumstance that:

> (2) The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.

In the second sentencing hearing below, the trial court, over defense counsel's objection, permitted the State to present to the jury evidence that the Petitioner had been convicted prior to the hearing of the offense of accessory before the fact to Second Degree Murder, and to rely upon said conviction as an "aggravating circumstance" under T.C.A. 39-2-203(i)(2) (Tr. 632-633, 653). The jury returned a verdict finding the aggravating circumstance charged.

The evidence upon which this finding was based was the judgment of conviction entered against the Defendant on June 15, 1982, after his first trial and conviction on the instant case, in Division I of the Hamilton County Criminal Court, which was based on a plea of nolo contendere agreed to by the State and the defense and accepted by the Court (Exh. 1 to the Motion for New Trial). The Petitioner respectfully contends that the action of the trial court in permitting the State to rely on and the jury to consider this conviction as a "aggravating circumstance" was a violation of the Petitioner's right to due process of law.

Rule 11(a) of the Tennessee Rules of Criminal Procedure provides, in pertinent part, that "a defendant may plead guilty, not guilty, or nolo contendere". Rule 11(b) provides that a "defendant may plead nolo contendere only with the consent of the Court. Rule 11(e)(6) provides, in pertinent part, as follows:

> Except as otherwise provided in this paragraph, evidence of . . . a plea of nolo contendere . . . is not admissible in any civil or criminal proceeding against the person who made the plea . . ..

There appear to be no reported decisions in Tennessee as to the propriety of permitting the state to use, for enhancement of punishment or for the purpose, in subsequent proceedings, convictions based upon nolo contendere pleas in prior criminal cases.

Many cases in other jurisdictions have, however, held that it is improper. See, for example: Snipes v. State, 404 So.2d 106 (Ala. Crim. App. 1981); State ex rel. Woods v. Thrower, 191 So.2d 420 (Ala. 1961); State v. Stone, 95 S.E.2d 77 (1956); Donaldson v. State, 407 So.2d 623 (Fla. App. 1981); North Caroline State Bar v. Hall, 238 S.E.2d 521 (N.C. 1977); United States v. Reisfield, 188 F. Supp. 631 (D.C. M.D. 1960); State v. Barbour, 90 S.E.2d 388 (1955); In re: Corcoran, 337 P.2d 387 (1959); Cominetti v. Imperial Mutual Life Insurance

Company, 139 P.2d 681; Herman v. State Board of Pharmacy, 272 N.E.2d 924 (Ohio 1971).

The petitioner acknowledges that there is some authority to the contrary. See Annotation: 89 A.L.R.2d 548, 62 (1963). Also see, a series of cases which apparently are inconsistent with Donaldson v. State, supra, ending with Maselli v. State, 446 So.2d 1079 (Fla. 1984).

In a case that was concerned with the timeliness with which an appeal was taken from a judgment of conviction and sentence in a criminal case under Rule 37(a)(2) of the Federal Rules of Criminal Procedure, this Court held that a nolo contendere plea is not a "determination of guilt" until the pronouncement of judgment. Lott v. United States, 367 U.S. 421, 81 S.Ct. 1563, 6 L.Ed.2d 948 (1961).

In the instant case, the petitioner was relying upon advise of counsel, who, in turn relied upon Rule 11(e) of the Tennessee Rules of Criminal Procedure, which provides that: ". . . a plea of nolo contendere . . . is not admissible in any civil or criminal proceeding against the person who made the plea . . .." Furthermore, the petitioner and his counsel, knew that he had a death sentence on appeal at the time that he entered this plea and were acutely aware of the significance that a plea of guilty would have should that appeal be successful, which it was on the question of sentence.

The petitioner, therefore, respectfully submits, that the cumulative effect puts the petitioner in a position where his good faith reliance on the laws of the State of Tennessee was apparently ill-advised and consequently resulted in the deprivation of his due process rights as provided in the Fourteenth Amendment to the federal constitution.

As a matter of policy, the petitioner respectfully submits that the use against him of this plea of nolo contendere is contrary to the intent and purpose of T.C.A. 39-2-203(i)(2) which requires that the defendant had been previously "convicted". To allow the State to rely upon a prior

"conviction" as an aggravating circumstance in an effort to impose against him death by electrocution, the ultimate punishment, should we not require that his "guilt" underlying the previous "conviction" has been established, either beyond a reasonable doubt, or by his open court admission of guilt? How else can we be sure of the reliability of this record of the prior conviction? See, for example, State ex rel. Woods v. Thrower, 191 So.2d 428 (1961); State v. Thorpe, 457 N.E.2d 912 (Ohio 1983); 21 Am.Jur.2d Cr. L. 492, 497. Furthermore, the petitioner submits that the nolo contendere plea entered by him on June 15, 1982 was entered in a proceeding and under circumstances in which the trial court did not make a proper inquiry to determine if the petitioner understood the nature and elements of the charges pending against him, the nature and consequences of his plea, and the factual basis for the charges and the plea that he made as required by the authority cited in Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); and State v. Mackey, 553 S.W.2d 337 (Tenn. 1977).

A review of the transcript of that June 15, 1982 hearing, which was introduced into evidence in the instant case (see: Exh. 1, to the Motion for New Trial), reveals that the judge never explained to the petitioner, or inquired of him as to whether he understood the nature of the charge to which he was pleading, Nor did the judge inform him of, or inquire of him whether he understood, what the minimum and maximum legal penalties were for the offense of accessory before the fact to second-degree murder.

The judge at this plea hearing also did not fully explain to the petitioner or inquire as to whether he understood the consequences of his plea and of the conviction to be entered thereon, particularly that such conviction might be used against him in a subsequent proceeding. Nor does the summary of the facts made by the State's attorney during the plea hearing establish a factual basis for the offense pled to.

With regard to the factual basis, the District Attorney's summary of the facts merely stated that on a certain date one Mark Edmonds was shot by Terri Teague with a .45 caliber pistol after Edmonds entered her apartment, that the defendant was acquainted with Edmonds, and that the "net result" of the police investigation, "without going into all the details of the investigation," would "make out a case that Raymond Eugene Teague was guilty of accessory before the fact of second-degree murder of John Mark Edmonds" (Exh. 1 to Motion for New Trial). This summary simply does not set forth sufficient facts which, if admitted, would establish the petitioner's guilt. It is little more than the district attorney's personal conclusion as to what the evidence would show. And, furthermore, by his plea of nolo contendere, the petitioner does not admit the accuracy of the summary.

It is well-established that a guilty plea must be voluntarily and intelligently made by a criminal defendant; and, if it is not, it is made in violation of his federal constitutional rights. Henderson v. Morgan, supra; Boykin v. Alabama, supra; State v. Mackey, supra.

VI. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S REQUEST FOR INDIVIDUAL VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS IN VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS.

Prior to jury selection, defense counsel moved the trial court to be allowed individual questioning of each prospective juror out of the presence of the other prospective jurors. The trial court denied this request (Tr. 12-15). The prospective jurors were then questioned in a group so that they could all hear the questions propounded to, and the answers given by, each of their fellows, as well as the Court's rulings on their responses.

The petitioner respectfully submits that the denial of this request for individual sequestered voir dire of the prospective jurors out of the presence of each other was an abuse of discretion and in violation of the petitioner's right

to a fair and impartial jury as provided in the Sixth Amendment to the United States Constitution and his right to due process of law as provided in the Fourteenth Amendment to the United States Constitution.

In this regard, the petitioner requests this Court to adopt a position, inconsistent with State v. Simon, 635 S.W.2d 498 506 (Tenn. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 473 (1982) and State v. Workman, 667 S.W.2d 44, 49 (Tenn. 1984); but consistent with Hovey v. Superior Court of Alameda County, 616 P.2d 1301 (Cal. 1980), which is not the only case having held consistent with the petitioner's position; but, which adequately states the position upon which the petitioner relies.

CONCLUSION

Based upon the foregoing reasons, the petitioner respectfully requests this Honorable Court to grant him a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Application Motion has been forwarded to the Honorable Wayne Uhl, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, on this 5 day of March, 1985.

WILLIAM P. REDICK, JR.

upon the happening of the contingencies expressed therein. The 1970 trust had not come into existence because it had no res. Nothing had vested in the minor children as third party beneficiaries that was not subject to termination or modification by husband and wife. Thus, the 1974 trust was validly created and funded on May 1, 1974, and expressly terminated and cancelled in its entirety the 1970 trust, and also terminated the three funding agreements in the 1970 property settlement agreement, substituting therefor the funding provisions of the 1974 trust.

III.

At some stage of this unfortunate and lengthy litigation, the jurisdiction of the Fourth Circuit Court of Davidson County to make any adjudication with respect to the trust issues was questioned by husband.

The Fourth Circuit Court of Davidson County is a court of limited jurisdiction. It was created by the Public Acts of 1957, chapter 44, and its grant of jurisdiction is as follows:

> Section 2. *Be it further enacted*, That the said Fourth Circuit Court of Davidson County shall be held in the City of Nashville, and shall have concurrent jurisdiction with the Circuit Court of Davidson County, the Second Circuit Court of Davidson County, and the Third Circuit Court of Davidson County on all matters involving divorces, annulments, separate support and maintenance, custody of children, support of children, care of children, adoptions, actions brought under the Uniform Reciprocal Enforcement of Support Act, certiorari and/or appeals from the Juvenile Court, and any and all other types and kinds of actions, litigation and proceedings involving domestic matters and the relationship of husband and wife, and parent and child.

[5] The creation and modification of the 1970 and 1974 trusts were interwoven with the settlement of the marital rights of the parties and the provisions for their minor children. The rule of *Freland* and its progeny classifying as contractual matters agreements beyond the scope of the Court's power to modify, has no effect whatsoever on the jurisdiction of courts in domestic relations litigation. Such contractual agreements are almost always relevant to the continuing supervisory jurisdiction of the divorce court. The Fourth Circuit Court of Davidson County clearly does not have general jurisdiction of litigation involving fiduciaries and trust estates. However, we have no difficulty in finding that the disputes in the litigation involved domestic matters, the relationships of husband and wife and parent and child, and that the Fourth Circuit Court of Davidson County had jurisdiction to adjudicate those controversies. The fact that it was necessary to resort to a single principle of trust or contract law to resolve one of the issues did not divest that Court of jurisdiction of this case.

The results reached by the Court of Appeals on all issues before it except the status of the 1970 trust are affirmed. This case is remanded to the Fourth Circuit Court of Davidson County for the entry and enforcement of a decree consistent with this opinion. Each of the parties shall pay one-half of the costs on appeal.

COOPER, BROCK, HARBISON and DROWOTA, JJ., concur.

STATE of Tennessee, Appellee,

v.

Raymond Eugene TEAGUE, Appellant.

Supreme Court of Tennessee,
at Knoxville.

Jan. 31, 1983.

Defendant was convicted before the Criminal Court, Hamilton County, Campbell Carden, J., of murder in the first degree,

and he appealed. The Supreme Court, Cooper, J., held that: (1) evidence was sufficient to prove both "corpus delicti" and defendant's criminal agency beyond reasonable doubt; (2) state could not, absent appropriate evidence, be charged with suppression of evidence; (3) witnesses were called by State in logical order; (4) trial court did not abuse its discretion in admitting into evidence videotape of murder scene; (5) defendant was not prejudiced by trial judge's refusal to sever murder trial from weapons charge trial; (6) evidence was insufficient to find that State had entered into "deal" with witness to reduce pending charges in exchange for testimony; but (7) admission into evidence of dismissed warrant, charging defendant with conspiracy to commit murder, was error, requiring remand for sentencing hearing.

Affirmed in part, reversed in part, and remanded.

Brock, J., concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐533(2)

"Corpus delicti" may be established by confession, if supported by other direct or circumstantial evidence consistent with confession.

2. Homicide ⇐228(1), 253(1)

Evidence was sufficient for rational jury to find both that "corpus delicti" and criminal agency of defendant were proven beyond reasonable doubt and justified jury in finding defendant guilty of murder in the first degree.

3. Constitutional Law ⇐268(5)

If State withheld evidence material to issue of "corpus delicti" and such evidence was material either to guilt or punishment, such would be violation of due process and conviction of defendant of murder in the first degree would have to be reversed. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐268(5)

Absent evidence in record indicating that State suppressed evidence, material or otherwise, State could not be charged with suppression of evidence and concomitant denial of defendant's due process rights. U.S.C.A. Const.Amend. 14.

5. Criminal Law ⇐703, 722½
Homicide ⇐156(2), 166(5)

Defendant in prosecution for murder in the first degree was not denied fair trial by prosecution's opening and closing argument statements to effect that victim was to have been key prosecution witness at defendant's trial for another murder or by admission in evidence of indictment for such other murder and fact that victim had taped conversations with defendant relative to such other murder, since such were relevant to show defendant's motive for killing and were relevant to issue of premeditation and malice.

6. Criminal Law ⇐369.2(1)

If evidence that defendant has committed crime separate and distinct from one on trial is relevant to matter actually in issue in case on trial and if its probative value is not outweighed by its prejudicial effect upon defendant, such evidence may be properly admitted.

7. Criminal Law ⇐700(7)

State in prosecution for murder in the first degree did not call witnesses to stand in way calculated to prejudice jury against defendant, but, rather, called witnesses in logical order.

8. Criminal Law ⇐338(4, 8), 1153(1)

Admissibility of authentic, relevant photographs or videotape of crime scene or victim is within sound discretion of trial judge and his ruling on admissibility of such evidence will not be overturned without clear showing of abuse of discretion.

9. Criminal Law ⇐338(8)

Trial court in prosecution for murder in the first degree did not abuse discretion in admitting into evidence videotape of victim's apartment and of scene where body of victim was found.

10. Criminal Law ⇐629(1)

Since all circumstances regarding officer's contact with defendant were relevant

to murder trial, including fact that officer arrested defendant on weapons charge on street almost directly in front of victim's apartment, no abuse of discretion or undue prejudice to defendant arose as result of trial judge's decision to try murder charge and weapons charge at same time.

11. Constitutional Law ⇐268(10)

Evidence concerning prosecution of charges pending against witness, including denials that witness was made promises in exchange for giving statements to police or trial testimony, did not give rise to showing of "deliberate deception of the court and jurors" denying due process. U.S.C.A. Const.Amend. 14.

12. Homicide ⇐354

In sentencing phase of first-degree murder trial, evidence of any matter that court deems relevant to punishment is admissible. T.C.A. § 39-2404(c) (now § 39-2-203(c)).

13. Homicide ⇐354

Evidence is relevant to punishment in first-degree murder trial only if it is relevant to statutory aggravating circumstance or to mitigating factor raised by defendant. T.C.A. § 39-2404(c) (now § 39-2-203(c)).

14. Criminal Law ⇐1181

Admission into evidence over objection of defendant in sentencing phase of first-degree murder trial of warrant charging defendant with conspiracy to commit murder which had been dismissed for lack of evidence was error requiring that sentence of death be reversed and cause remanded for sentencing hearing. T.C.A. § 39-2404(c) (now § 39-2-203(c)).

Edward E. Davis, Robert J. Batson, Jr., Chattanooga, for appellant.

Wayne E. Uhl, Asst. Atty. Gen., William M. Leech, Jr., Atty. Gen., Nashville, for appellee.

OPINION

COOPER, Justice.

Appellant, Raymond Eugene Teague, has appealed his conviction of murder in the first degree, and the sentence of death. On reviewing the record, we find no merit in any of the several assignments of error directed to the guilt phase of the trial. We are of the opinion, however, that the admission in evidence of a warrant charging appellant with conspiracy to commit murder was error which requires a reversal of the penalty of death and a remand of the cause for a sentencing hearing.

The victim was Terri Teague, who was formerly married to the appellant. Mrs. Teague's body was found at about 10:30 a.m., on April 4, 1980, floating face down in the bathtub in her apartment on Towne Hills Drive in Chattanooga, Tennessee. An autopsy revealed that within an hour before her death, Mrs. Teague had sustained a blow to her left temple of sufficient force to "addle" her, and which could have caused her to be unconscious.

Mrs. Teague, who lived alone, was very security conscious. In addition to the regular door locks, her front door had a deadbolt lock and a safety chain, and she had had a peephole installed. She kept a heavy piece of furniture pushed against the back door, to make entry through that door more difficult. At the time her body was discovered, the front door was secured only by the regular door locks. A pane of glass in the back door had been broken and pieces of glass were on the kitchen floor, indicating that the blow that broke the glass came from outside. Further, one end of the piece of furniture normally against the back door had been moved away from the door.

The detective team assigned to investigate Mrs. Teague's death knew her from another homicide investigation. In July of 1979, John Mark Edmonds was killed, evidently by shots fired by Mrs. Teague. The circumstances of that killing are not shown in the record. However, the record does show that Mrs. Teague agreed to help the police in their investigation of the homicide

by concealing a transmitter on her person and recording conversations with appellant relative to the death of Edmonds. Subsequently, appellant was charged in a two-count indictment with the murder of Edmonds, and with the moving, inciting, counselling, hiring, and commanding or procuring Teresa Teague to murder Edmonds. Mrs. Teague was scheduled to be a key witness for the prosecution. After the indictment was returned, appellant found out about the taped conversations and obtained transcripts of the tapings. Appellant admitted in the trial of this case that in one of the taped conversations, he had told Mrs. Teague that if she died she would die in a bathtub.[1]

The detectives also learned from police records that within the time frame of Mrs. Teague's death, appellant had been arrested on Town Hills Drive at a point almost in front of Mrs. Teague's apartment. Officer Chandler, who made the arrest, testified that he had been dispatched to the Towne Hills Drive area to investigate the occupants of a truck seen in the subdivision on several occasions in the early morning hours of April 4, 1980. The officer stopped the truck by flashing his "blue" police light. Marshall Skinner was driving the truck, Jimmy Cook was seated in the middle and appellant was on the passenger side. The officer asked Skinner for his driver's license. As Skinner was getting it, the officer heard the noise of metal striking metal in the cab of the truck, and saw appellant bending over. The officer drew his revolver, ran to the back of the truck, ordered the men out and had them place their hands upon the tailgate of the truck. Officer Chandler then looked into the truck and saw a loaded and cocked .45 caliber automatic pistol on the floor at the point where appellant had been seated. On appellant admitting the pistol was his, he was arrested and charged with unlawfully carrying a pistol with the intent to go armed.

While these events were taking place, a second officer, Fred Layne, arrived at the scene and assisted in the arrest and in filling out field interrogation forms. The officers testified that no search was made of the truck at the scene of the arrest, but each noticed a brown plastic garbage bag, apparently filled with clothing, sitting on the floor of the truck cab.

The officers also testified that in conversation at the scene of the arrest, Officer Chandler mentioned that his report of the incident would result in the three men being suspects in the event a burglary or murder later was reported to have occurred in the area. On hearing this, appellant fainted and collapsed on the ground. Appellant's explanation was that he was highly nervous at having been arrested at the point of a gun.

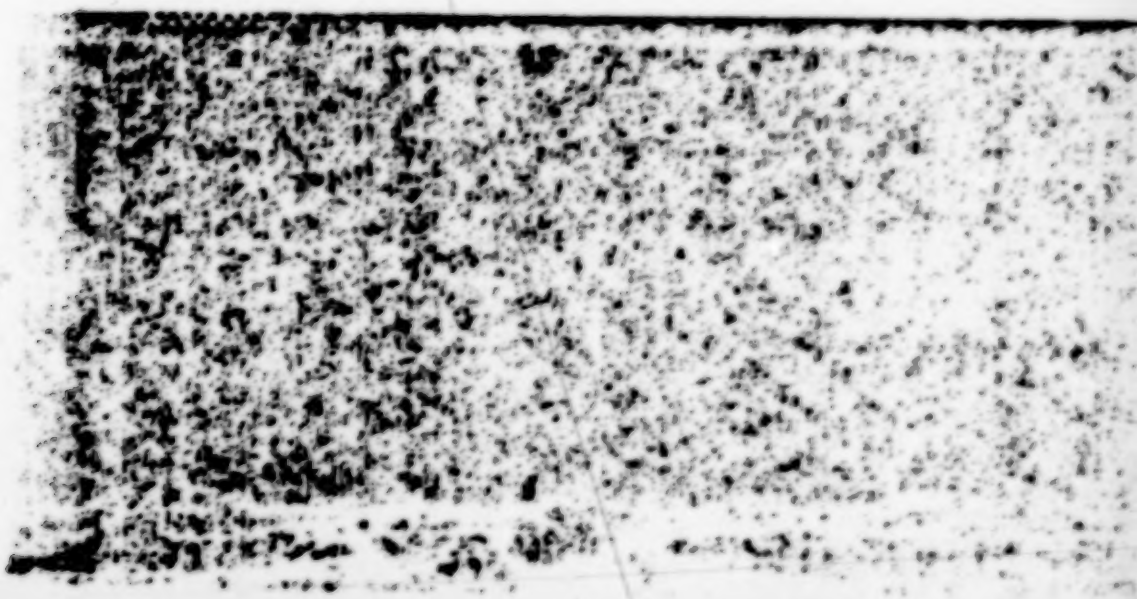
Appellant was transported to and was incarcerated in the Hamilton County jail. Within a few hours and before the body of Mrs. Teague was discovered, Jimmy Cook arranged to have appellant released on bond.

After learning of the arrest of appellant on the gun charge, and while it occurred, the detectives immediately began looking for the appellant, Cook, and Skinner. Jimmy Cook was located almost immediately and made a statement to the detectives. Appellant was arrested and charged with murder soon afterward. Marshall Skinner came to police headquarters two days later to make his statement. Skinner then took the police to the place where he had thrown a brown plastic garbage bag which Skinner stated had been brought to the truck by appellant.

The bag contained a yellow sheet matching the one found in the washing machine in Teresa Teague's apartment. Hair on the sheet was found to be microscopically identical to Mrs. Teague's hair. A blouse and skirt of Mrs. Teague's were also in the bag. Several shards of glass found in the bag matched the breakage pattern of the bro-

so only a shower.

1. There is evidence that thereafter Mrs. Teague would not take a bath, but limited her bathing



ken pane of glass in the back door and carpet fibers found in the bag matched samples taken from the Teague apartment. The bag also contained a letter from the District Attorney to Mrs. Teague advising her that the trial of appellant on the charge of murdering Edmunds had been passed to a later date. A pair of gloves in the bag were identified as belonging to appellant and having been worn by him on the night the murder of Mrs. Teague occurred.

In their statements, and at trial, both Cook and Skinner testified that appellant had directed them into the subdivision where Mrs. Teague lived and had pointed out her apartment. They also testified that on the first two trips through the subdivision, the appellant had told them not to stop as the lights were on in the Teague apartment. On two occasions, after the lights in the apartment were out, they let appellant out of the truck near the apartment and returned to pick him up at the times specified by appellant. On the second occasion, they saw appellant on the porch of the Teague apartment. The door to the apartment was open, and appellant had a brown plastic garbage bag in his hand. According to them, appellant brought the bag to the truck. They further testified that as the truck started to move away from the vicinity of the Teague apartment, a police car came over the crest of the hill with its "blue lights" flashing. Skinner testified that when Teague saw the police car, he said, "Oh, shit. I hit that bitch." Cook testified that as appellant got into the truck, he said that he had killed Terri. Cook also testified that about a month and a half before Mrs. Teague's death, appellant had expressed the belief that if Terri were "out of the way" the Edmunds' murder case would never go to court, and that on the night of Terri's death, appellant had said "he was going to kill Terri."

[1, 2] Appellant insists that the above evidence is insufficient to prove either the "corpus delicti" or the criminal agency of appellant beyond a reasonable doubt. We disagree. "Corpus delicti" may be established by a confession, if supported by other direct or circumstantial evidence consistent with the confession. *Berkdale v. State*, 390 Tex. 322, 326, 292 S.W.2d 101, 105 (1956). Here the state presented evidence that forcible entry was made into Terri Teague's apartment on the night of her death. She drowned in a full bathtub despite the fact she never took baths in a tub. The sheet from her bed, clothing worn by her, shards of glass from the back door, and correspondence addressed to Mrs. Teague were removed from the apartment on the night of her death. These are the same items found in the plastic garbage bag. In addition, there is evidence that appellant had the motive and opportunity to kill Terri Teague. He told her in a taped conversation that if she died, it would be in a bathtub. He expressed the opinion to Cook that his indictment for murder of Mark Edmunds would never go to court if Terri were out of the way. On the night of Terri's death, appellant told Cook that he was going to kill Terri. After he left Terri's apartment, he told both Skinner and Cook that he had killed her. We think this evidence is sufficient for any rational jury to find that both the "corpus delicti" and the criminal agency of the appellant were proven beyond a reasonable doubt and justifies the jury finding appellant guilty of murder in the first degree.

[3, 4] In a separate assignment of error, the appellant raises the specter that the state withheld evidence material to the issue of "corpus delicti." We agree with appellant that if the state did this and the evidence was material either to guilt or punishment, it would be a violation of due process and the conviction of appellant would have to be reversed. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). But we find no evidence in the record that indicates the state suppressed evidence, material or otherwise. The state complied with the order of the trial judge to furnish counsel for appellant with "all information of whatever source, form or nature, which would or might tend to exculpate the [appellant]." The summary of the medical examiner indi-

cated that he had sent blood samples of the deceased to the Georgia Crime Laboratory for testing. This fact was verified by the medical examiner in testifying in this case. The medical examiner also testified that he had not received any test results from the Georgia Crime Laboratory, and that such tests were not necessary to his determination that Terri Teague's death was due to "drowning in a bathtub and aspiration of vomitus." Further, the record shows that no member of the prosecution team possessed or was aware of any blood test results. Absent some indication that the tests were run and that a report exists, in our opinion the state cannot be charged with the suppression of evidence and the concomitant denial of appellant's due process rights.

[5, 6] In a general assignment of error, the appellant insists that he was denied a fair trial "by the use of certain tactics and procedures of the prosecution." In the course of the discussion of the assignment, appellant complains of reference by the prosecution, in its opening and closing statements, to the indictment of appellant for the murder of John Mark Edmonds and the fact that Teresa Teague was to be a key witness for the prosecution. Appellant also complains of the admission in evidence of the indictment and of the fact that Teresa Teague had taped conversations with appellant relative to the Edmonds murder. We see no error in either of these acts of the prosecution. The evidence in question was relevant to show appellant's motive for the killing of Terri Teague. It also was relevant to the issue of premeditation and malice, both being elements of first degree murder. As is pointed out in *Hamb v. State*, 605 S.W.2d 227, 229 (Tenn.1980),

> [I]f evidence that the defendant has committed a crime separate and distinct from the one on trial, is relevant to some matter actually in issue in the case on trial and if its probative value as evidence of such matter in issue is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted.

[7] In addition, appellant complains of the prosecution's version, given in argument, of how the murder occurred. Further, appellant insists that "the State deliberately called its witnesses to the stand in a way calculated to prejudice the jury against the [appellant] because of the State's recognition that they could not prove the corpus delicti," and that the action by the state was a "facet of a planned, deliberate effort by the State to paint a false picture of murder in the minds of the jurors by arguments and statements to the jury, known to be false when made." We see no basis in the record for these charges. As heretofore noted, we are of the opinion that statements and arguments made by the prosecution to the jury were in accord with the evidence. We are also of the opinion that witnesses were called by the state in logical order, and that the "corpus delicti" was proven beyond a reasonable doubt as was the guilt of appellant.

[8, 9] Appellant also insists the trial judge committed prejudicial error in permitting the jury to view a videotape of Terri Teague's apartment and of the water where the body of Terri Teague was found. Appellant argues that the still pictures of the apartment and the body were adequate and that the probative value of the videotape was "far outweighed by it's prejudicial effect."

The admissibility of authentic, relevant photographs, or a videotape of a crime scene or victim, is within the sound discretion of the trial judge, and his ruling on the admissibility of such evidence will not be overturned without a clear showing of abuse of discretion. *See State v. Banks*, 564 S.W.2d 947 (Tenn.1978); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808, 815-816 (1979), cert. denied 445 U.S. 972, 100 S.Ct. 1668, 64 L.Ed.2d 249 (1980); *State v. Brooks*, 30 Wash.App. 280, 633 P.2d 1345, 1349 (1981). We see no abuse of discretion in the admission of the videotape into evidence in this case.

The video tape has the added advantage of showing the layout of the apartment, the size of the rooms, the positions of the doors

ways, the placement of furniture and the general state of the murder scene at the time Terri Teague's body was discovered, and doing it in a continuous display seen by all the jurors at one time. The videotape also gives the jurors a better view of the exact position of the body as the police officers found it, which in this case is important to the determination of the "weapon defect."

[10] Further, appellant contends that he was prejudiced by the trial judge's refusal to sever the trial of the murder charge from the trial of the weapons charge. Appellant argues that the charges were not in any way similar, related or connected, and that the only purpose of consolidation was to get the testimony of the arresting officer, Dan Chandler, into evidence. In our opinion the basis for this argument is unsound. The testimony of Officer Chandler would have been admissible in the trial of the murder charge even if the weapons charge had not been tried at the same time, as it placed appellant in the vicinity of the apartment where Terri Teague was killed and within the time frame of her death. All circumstances attendant Officer Chandler's contact with the appellant in the early morning hours of April 4, 1986, were relevant to the murder trial, including the fact that he had arrested appellant on a weapons charge on the street almost directly in front of Terri Teague's apartment. This being so, we see no abuse of discretion or undue prejudice to the appellant as the result of the trial judge's decision to try the murder charge and the weapon's charge at the same time.

[11] In the remaining issue directed to the guilt phase of the trial, appellant insists that the state withheld evidence from the jury of a "deal" with Skinner to reduce charges pending against him in exchange for his testimony against appellant, and that this violated appellant's right to due process. The record shows that several months after the murder trial, Skinner was allowed to plead to a reduced charge in cases pending against him. Appellant reasons from this that it was the consequence of a deal Skinner made with the prosecution to get the appellant. This is not borne out by the record. The jury in this case was apprised of the charges pending against Skinner. Detective Bryan, Jimmy Cook, and Marshall Skinner all testified that neither Cook nor Skinner was made promises in exchange for giving statements to the police or their trial testimony. When the case came up again in argument of the amended motion for new trial, the prosecutor confirmed this in open court. Furthermore, it is interesting to note that after appellant was convicted, several adversary motions were filed in the cases pending against Skinner, indicating that the state was dealing with Skinner at arms length. We agree with the state that "this evidence hardly rises to a showing of 'deliberate deception of a court and jurors' denying due process." *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Without some proof that deals were made, it cannot be said that due process was denied. This issue is without merit.

In the sentencing hearing held before the same jury that determined appellant's guilt, in urging that the jury return the death penalty, the state relied on two statutory aggravating circumstances: (1) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the appellant. *See* T.C.A. 39-2404(i). In its effort to prove these aggravating circumstances, the state "stood" on the evidence introduced in the guilt phase of the trial and filed, over the objection of the appellant, a state warrant issued on June 1, 1978, charging appellant with "conspir[ing] with John Edmonds and Dale Edmonds to murder James Lowe, Jr." The warrant showed on its face that it was dismissed on the recommendation of the state on June 13, 1978.

The appellant called several witnesses who testified, in substance, that appellant was a good father who had never exhibited any animosity toward either Terri Teague or the children, and who had on numerous

occasions been helpful to Terri in solving some of her personal problems. Several of these witnesses were questioned extensively concerning the circumstances attendant the issuance of the warrant and the reason for the recommendation by the state that the warrant be dismissed.

On considering the evidence before it, the jury found that the state had established the two statutory aggravating circumstances beyond a reasonable doubt, and that the aggravating circumstances were not outweighed by any mitigating circumstance or circumstances, and returned a sentence of death by electrocution.

Appellant challenges the sufficiency of the evidence that formed the basis of the jury's findings, and specifically questions the admissibility of the warrant issued on June 1, 1978, charging the appellant with conspiracy to commit murder.

[12, 13] In the sentencing phase of a first degree murder trial evidence of "any matter that the court deems relevant to the punishment" is admissible. *See* T.C.A. § 39-2404(c). Evidence is relevant to the punishment only if it is relevant to a statutory aggravating circumstance or to a mitigating factor raised by the defendant. *Cazallas v. State*, 544 S.W.2d 765 (Tenn.1976).

[14] In our opinion, the admission of the warrant into evidence over the objection of the appellant was error. The fact that appellant was arrested in 1978 on a charge of conspiracy to commit murder, in our opinion, is not relevant to either of the statutory aggravating circumstances sought to be proven by the state, or to a mitigating factor raised by appellant. Furthermore, since the state dismissed the charge against appellant for lack of evidence, without even asking for a probable cause hearing, the warrant could have no probative value. We have no certain way of knowing whether the jury would have sentenced appellant to death if they had not considered evidence that appellant had been arrested in 1978 on a serious felony charge. It does appear to us, however, that some prejudice, of necessity, resulted from the jury considering the warrant and the subsequent arrest of appellant. As heretofore noted in the guilt phase of the trial, the state introduced evidence tending to show that the motive for the killing of Teresa Teague was to keep her from testifying against appellant on a charge that he had murdered John Mark Edmonds. A consequence named in the improperly admitted 1978 warrant was John Edmonds. The probability of prejudice resulting from the consideration of the improperly admitted evidence, in our opinion requires that the sentence of death be reversed and the cause be remanded to the trial court for a sentencing hearing.

Appellant also insists that T.C.A. § 39-2404(g) is unconstitutional in that it makes the death penalty mandatory under certain circumstances, and gives the jury no discretion in questioning whether its earlier verdict finding the appellant guilty of murder in the first degree is correct. Similar attacks on the constitutionality of the sentencing phase of the Tennessee Death Penalty Act have been made in other cases and have been found to be without merit. *See State v. Dicks*, 615 S.W.2d 126 (Tenn.1981), *cert. denied*, 454 U.S. 933, 102 S.Ct. 131, 70 L.Ed.2d 240; *Houston v. State*, 593 S.W.2d 287 (Tenn.1980), *cert. denied*, 449 U.S. 864, 101 S.Ct. 214, 66 L.Ed.2d 107.

The conviction of appellant for murder in the first degree is affirmed. The sentence of death imposed on the murder conviction is reversed, and the cause is remanded to the trial court for a sentencing hearing. Costs incident to the appeal are adjudged against the appellee; all other costs will be assessed in the trial court.

FONES, C.J., and HARBISON and DROWOTA, JJ., concur.

BROCK, J., concurs in part and dissents in part.

BROCK, Justice, concurring in part and dissenting in part.

With respect to the constitutionality of the death penalty, I adhere to the views expressed in my dissenting opinion in *State v. Dicks*, Tenn., 615 S.W.2d 126, 132 (1981).

in all other respects I concur in the opinion of the Court.

CITY OF CHATTANOOGA, Appellant,

v.

Janet L. McCOY and Patricia Combs, Appellees.

Supreme Court of Tennessee, at Knoxville.

Feb. 7, 1983.

City brought action against dancers in nightclub under municipal ordinance prohibiting nudity and performance of number of simulated or actual sex acts. The Law Court, Hamilton County, Campbell Cantrell, J., enforced ordinance, but the Court of Appeals reversed, holding ordinance to be overbroad and violative of First and Fourteenth Amendments, and city appealed. The Supreme Court, Fones, C.J., held that ordinance prohibiting nudity, performance of number of sex acts, actual or simulated, and appearance of female dressed so as "wholly or substantially" to expose to public view one or both breasts in public place was valid exercise of police power and not unconstitutionally overbroad.

Court of Appeals reversed, judgment of trial court affirmed.

Constitutional Law ⇐90(1)
Obscenity ⇐2.5

Municipal ordinance prohibiting nudity, performance of a number of sex acts, actual or simulated, and appearance of female dressed so as "wholly or substantially" to expose to public view one or both breasts in public place was valid exercise of police power and was not unconstitutionally overbroad. U.S.C.A. Const.Amends. I, 14.

Eugene N. Collins, W. Lee Madden, Chattanooga, for appellant.

Larry G. Reddy, William C. Killian, Chattanooga, for appellees.

OPINION

FONES, Chief Justice.

The issue before this Court is the constitutionality of an ordinance of the City of Chattanooga that prohibits nudity, the performance of a number of sex acts, actual or simulated, and the appearance of a female dressed so as "wholly or substantially" to expose to public view one or both breasts, in a public place.

The ordinance was enforced in the trial court but the Court of Appeals held it to be overbroad and violative of the First and Fourteenth Amendments of the United States Constitution as interpreted by the Supreme Court of the United States.

I.

Defendants were dancers at the Night Haven Lounge in Chattanooga. The undisputed proof was that they performed a dance routine clothed in a "g-string" covering their genital area and "clear pasties," if anything, covering their breasts. After performing the dance each defendant went to a different table and each defendant was observed allowing a male patron to fondle her breasts.

II.

Chattanooga Ordinance Number 7439 reads in pertinent part as follows:

"Section 25-49.2

(a) It shall be unlawful for any person to perform in a public place, or for any person who owns or operates premises constituting a public place to knowingly permit or allow to be performed thereon, any of the following acts or conduct:

(1) The performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law;

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(12)

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

FOR PUBLICATION

STATE OF TENNESSEE,)
APPELLEE)
)
VS.)
)
RAYMOND EUGENE TEAGUE,)
APPELLANT)

HAMILTON CRIMINAL

HON. DOUGLAS A. MEYER, JUDGE

S.CT. NUMBER 73

For Appellant:

Robert J. Batson, Jr.
Thomas M. Fleming
Chattanooga, Tennessee

For Appellee:

W. J. Cody
Attorney General & Reporter

Wayne E. Uhl
Assistant Attorney General
Nashville, Tennessee

AFFIRMED

COOPER, C.J.

O P I N I O N

This is a direct appeal of a death penalty. In an earlier trial, the defendant was convicted of murder in the first degree and was sentenced to death by electrocution for the killing of his ex-wife, Terri Teague. The conviction was affirmed on appeal, but the sentence of death was reversed and the case was remanded for a re-sentencing hearing. State v. Teague, 645 S.W.2d 392 (Tenn. 1983). In the re-sentencing hearing, the jury again fixed defendant's sentence as death by electrocution. It is from this sentence that the present appeal is taken.

In seeking the penalty of death in the re-sentencing hearing, the state relied on, and the jury found, two aggravating circumstances to exist.

> (1) The defendant was previously convicted of a felony other than the present charge, which involved the use or threat of violence to the person. See T.C.A. § 39-2-203(i)(2).
>
> (2) The murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another. See T.C.A. § 39-2-203(i)(6).

The jury also found that there were no mitigating circumstances "sufficiently substantial to outweigh the aggravating circumstances."

In our opinion, the evidence supports and justifies the jury's verdict imposing the sentence of death by electrocution on the defendant for the murder in the first degree of his ex-wife, Terri Teague.

The defendant has questioned numerous rulings by

the trial judge on the admissibility of evidence, insisting that "a great deal" of evidence was not germane or relevant to the statutory aggravating circumstances relied on by the state, or was impermissible hearsay. The defendant also insists that the trial court erred in permitting the state to rely on defendant's conviction as an accessory before the fact to second-degree murder as an aggravating circumstance, questioning the timing of the conviction and the fact that the conviction was predicated on a plea of nolo contendere, and insisting that there is nothing in the record to support a finding that the conviction was for a felony, which involved the use or threat of violence to the person.

While not developed to the extent that it was in the first trial, the state was permitted to introduce background evidence relevant to the murder of Terri Teague, but not directly relevant to any statutory aggravating circumstance relied on by the state in seeking the death penalty as punishment for the murder of Mrs. Teague. This evidence showed that Mrs. Teague's apartment had been forcibly entered and that Mrs. Teague had been drowned in the bathtub in her apartment. The jury also was informed that the defendant had been arrested on the night of the murder, while driving with two other men in the subdivision where the victim lived, and that the defendant was armed with a pistol. The defendant's two companions testified that Teague told them that he had killed his former wife.

Evidence also was introduced which showed that Terri Teague had shot and killed John Mark Edmonds. Terri coop-

erated with the police in their investigation of the killing and taped conversations between herself and the defendant. She also was a witness at the grand jury hearings. The defendant was indicted for first degree murder and accessory before the fact to first degree murder in the death of Edmonds. The state's theory of the Edmonds killing was that the defendant was the culpable person and had used and incited Terri to kill Edmonds.

Jimmy Cook, one of defendant's companions on the night Terri Teague was drowned, testified that the defendant had said the Edmonds case would never go to court if Terri were "out of the way."

On June 15, 1982, the defendant pleaded nolo contendere to the charge of accessory before the fact to murder in the second degree in the Edmonds case and was convicted and sentenced to serve ten years in the state penitentiary.

The defendant's proof in mitigation consisted of several friends and acquaintances, who testified to his good character as a father, friend, and worker. Employees at the Hamilton County Jail testified defendant was a model prisoner. A minister working with prisoners in the state penitentiary, testified as to defendant's adjustment to prison routine, his aid in solving the problems of other prisoners, and his obvious love and concern for his children. Defendant's mother testified he was a good son and father. His former attorney in the Edmonds case testified that he had advised defendant that the state could never make a case in the Edmonds killing and that defendant would probably be acquitte

The defendant questions the introduction of background evidence concerning the murder, insisting that in the

sentencing proceeding only evidence relevant to aggravating and mitigating circumstances should have been allowed at the hearing. Guidelines for re-sentencing hearings in general have been set out in Farris v. State, 535 S.W.2d 608, 621 (Tenn. 1976); Hunter v. State, 496 S.W.2d 900, 903 (Tenn. 1972); and in Huffman v. State, 200 Tenn. 487, 292 S.W.2d 738, 743 (1956). Under these guidelines, evidence of how the crime was committed, the injuries, and aggravating and mitigating factors are admissible. There appears to be no reason why such guidelines, carefully limiting evidence to the essential background, should not apply in capital cases in order to ensure that the jury acts from a base of knowledge in sentencing the defendant. See e.g. Blankenship v. State, 308 S.E.2d 369, 371 (Ga. 1983) (parties at capital re-sentencing are entitled to offer evidence relating to circumstances of crime.)

In the course of giving background information, the officer who arrested Teague near the victim's house testified that he heard a metallic noise hit the door of the truck next to Teague and that he found a cocked and loaded .45 Colt lying below the seat "where Mr. Teague had dropped it." The state used this incident to cross-examine character witnesses called by the defendant by showing that the defendant's behavior in riding around with a gun late at night was unknown to them or contrary to their opinion of him as a good worker and parent. We see no basic error in the reference to the gun incident in cross-examining character witnesses. See Paine, Tennessee Law of Evidence § 21 (1974).

Defendant has cited us to several statements in the

record, which he insists are inadmissible hearsay and are violative of the right to confrontation granted him by the Eighth Amendment. We find no merit in these contentions. The admissibility of three of the statements cited was not questioned by the defendant. The fourth objection--that is, to testimony that Mrs. Teague was afraid to take a bath--was sustained and, could not therefore be a factor in the jury's decision.

Defendant also insists that the state improperly cross-examined the defendant's mother, getting into the record information that was not otherwise admissible, and that the trial court erred in not declaring a mistrial. Mrs. Quarles testified on direct examination that the defendant had been a good son and had not given her any trouble of any kind other than the present case and the Edmonds case. On cross-examination the state asked if the defendant had been in any other trouble. When the witness answered "No" to the general question, the assistant district attorney general asked specifically, "Didn't you express your concern to me that you felt Randy was planning to kill somebody [in July, 1978]?" There was an objection by counsel to the question, and it was not answered. After a jury-out hearing, defendant's objection was sustained and his motion for mistrial was overruled. The judge then instructed the jury to disregard the question. With the record in this state, we find nothing to indicate that the overruling of the mistrial motion was an abuse of the trial judge's discretion, nor is there any indication that the asking of the question by the state affirmatively affected the jury's decision. State v. Compton, 642 S.W.2d 745, 746 (Tenn. Crim. App. 1982).

The defendant also questions rulings by the trial judge which kept from the jury evidence of the victim's character. The defendant wanted to show that Terri Teague had "cooly" killed Edmonds and that she had no concern for her children. Defense counsel also wanted to cross-examine witnesses called by the state about the victim's promiscuity, use of drugs, and possible embezzlement from her employer. In a sentencing hearing in a capital case, the jury must be permitted to consider any relevant mitigating evidence such as the defendant's character, record, or the circumstances of the offense. Lockett v. Ohio, 438 U.S. 586, 98 S.CT. 2945, 57 L.Ed.2d 973 (1978); Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979). However, evidence of the defects in the victim's character of the nature sought to be introduced in the re-sentencing hearing is not relevant mitigating evidence and consequently, was properly excluded.

Defendant insists that the conviction of the defendant as an accessory before the fact of murder in the second degree, upon his plea of nolo contendere, may not be used to prove that the defendant had been previously convicted of a felony other than the present charge, which involved the use or threat of violence to the person--a statutory aggravating circumstance found by the jury in this case. See T.C.A. § 39-2-203(i)(2). In support of his argument, defendant points out that Rule 11(e) of the Tennessee Rules of Criminal Procedure provides in part that evidence of a plea of nolo contendere is inadmissible in any civil or criminal proceeding against the person who made the plea. The rule relied on by the defendant is

based on FED. R. CRIM. P. 11(e) and was intended to prohibit the use of the plea to support an inference of guilt or as an admission against interest. FED R. CRIM. P. (11), Notes of Advisory Committee, 1975 Amendment note to Subsection (e)(6) and 1980 Amendment Note. A conviction based on the plea, however, may be used to enhance punishment in the same manner as a conviction after a not guilty plea, unless there is a specific statute to the contrary. See United States v. Williams, 642 F.2d 136, 139 (5th Cir. 1981). See also People v. Goodwin, 593 P.2d 326 (Colo. 1979); Miller v. State, 162 Ga. App. 730, 292 S.E.2d 102, 105-106 (1982); 24B C.J.S. Criminal Law § 1960(1) (1962); 21 Am. Jur. 2d, Criminal Law § 499 (1981); Annot. 89 A.L.R. 2d 540, §§ 42-50 (1963). We have no statute or Rule of Criminal Procedure that prohibits the use of a conviction on a plea of nolo contendere to enhance punishment.

Defendant further argues that the nolo contendere plea was invalid because the judge accepting the plea failed to follow the requirements of Rule 11(c) of the Tennessee Rules of Criminal Procedure to insure that defendant understood the consequences of the plea. This issue was not raised in the trial court until the motion for new trial was filed. We do have in the record, as an exhibit to the motion for new trial, the colloquy between the trial judge, the defendant, and defendant's counsel at the time the plea of nolo contendere was accepted. It is apparent from the colloquy that the plea was voluntary and that the defendant understood that he was losing his right to a jury trial and cross-examination. Further, it contains assurances of the defense counsel that the defendant fully

understood what he was doing. While the trial judge could have paid more attention to detail and followed exactly the admonition of Rule 11, the purposes of the rule were carried out by the procedure followed, that is, insuring the defendant made an informed plea and that plea agreements are brought out in open court. See Advisory Committee Note 1983, FED. R. CRIM. P. 11(h). See also State v. Miller, 634 S.W.2d 615 (Tenn. Crim. App. 1981); 2A Moore's Federal Practice ¶ 11.05 [2] (2d ed. 1984).

The defendant contends that there is no evidence that his conviction as an accessory before the fact to second degree murder is a felony involving the use or threat of violence to the person, and that it should not have been admitted to prove the aggravated circumstance set forth in T.C.A. § 39-2-203(i)(2). We see no merit in this contention. An accessory before the fact is a principal offender and is treated as such. T.C.A. § 39-1-302. Murder necessarily involves violence to a person. T.C.A. §§ 39-2-201 and 39-2-211(a). The fact the defendant did not fire the shot that killed Edmunds should make no difference since as an accessory he moved, incited, counselled, hired, commanded, or procured the murder. T.C.A. § 39-1-301.

The defendant also questions whether his conviction as an accessory before the fact to second degree murder was a "previous" conviction within the contemplation of the death penalty statute. This court pointed out in State v. Caldwell, ____S.W.2d_____,_____(Tenn. 1984) that:

> The language in [39-2-203(i)(2)], "previously convicted" clearly indicates that the date of the conviction, not of the commission of the crime, is the important factor. The order in which the crimes were actually committed is

irrelevant, as long as the convictions have been entered before the sentencing hearing at which they are introduced into evidence.

Teague's plea and conviction as an accessory before the fact to second degree murder occurred after Teague's first trial in this case, but before the re-sentencing hearing and, consequently, may be used as an aggravating factor. Elledge v. State, 408 So. 2d 1021, 1022 (Fla. 1982).

The defendant also raises a number of issues in relation to the voir dire. The defendant insists that the trial judge abused his discretion in refusing individual sequestered examination of prospective jurors, that jurors qualified to serve under the test set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968), were improperly excluded for cause, that voir dire by the defendant was improperly limited, and that the jury was "death qualified," denying the defendant a jury composed of a representative cross-section of the community. We have considered these issues and found them to be without merit. There is nothing in the record to indicate that any prejudice resulted from group voir dire in this case. See State v. Simon 635 S.W.2d 498, 506 (Tenn. 1982). The argument that the denial of individual sequestered voir dire maximizes the "untoward effects of death-qualification" was rejected in State v. Workman, 667 S.W.2d 44, 49 (Tenn. 1984). Further, the record shows that the trial judge excused for cause only those prospective jurors who stated unequivocally that they could not follow the law regarding the death penalty. Where there was any possible ambiguity in answers given by a prospective juror to qualifying

questions, the trial judge permitted counsel for the state and for the defendant to question prospective jurors fully, and cut short the questioning only when answers left no leeway for possible rehabilitation of the juror. We approved this procedure in State v. Strouth, 620 S.W.2d 467 (Tenn. 1981).

The defendant has two issues directed to the trial court's instructions to the jury. In the first, the defendant questions the sufficiency of the instruction on circumstantial evidence. The trial court defined both circumstantial and direct evidence, but did not include in the instructions the statement that to warrant a conviction on circumstantial evidence, the proof must exclude every other reasonable theory or hypothesis. The defendant made no request for such an instruction. Where the evidence is both direct and circumstantial, as in this case, the failure to give such an instruction is not error in the absence of a request. State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975).

The defendant also insists that the trial court erred in failing to include in its instructions non-statutory mitigating circumstances, as requested by the defendant. The trial court instructed the jury that it should "consider . . . any mitigating circumstance, which shall include, but are not limited to" the statutory mitigating circumstances, which he then read to the jury. The court refused to specifically cite seven additional circumstances, as mitigating, requested by the defendant, including the fact that the defendant was employed, was a good parent, a member of the Army Reserve, and other similar

testimony. In doing so, the judge properly pointed out that they were matters of evidence to be argued to the jury.

Appellant also insists that T.C.A. § 39-2-203(g) is unconstitutional in that it makes the death penalty mandatory under certain circumstances. A similar attack of the constitutionality of the sentencing phase of the Tennessee Death Penalty Act has been made in other cases and has been found to be without merit. State v. Teague, 645 S.W.2d 392 (Tenn. 1983); State v. Dicks, 615 S.W.2d 126 (Tenn. 1981), cert. denied, 454 U.S. 933, 102 S.Ct. 431, 70 L. Ed. 2d 240 (1981).

We have concluded from our review of the record that no reversible error was committed in the re-sentencing hearing, and that the sentence imposed by the jury is sustained by the evidence. The sentence of death by electrocution imposed on defendant is affirmed. The death sentence will be carried out on the 15th day of January, 1985, unless stayed by appropriate authority. Costs are adjudged against defendant.

Robert E. Cooper, C.J.

Concur:
Fones, Harbison,
and Drowota, JJ.

Dissent:
Brock, J.
For the reasons stated in my dissent in State v. Dicks, 615 S.W.2d 126, 132 (Tenn. 1981), I would hold that the death penalty is unconstitutional and the proper sentence in this case is life in the penitentiary.